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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-408

VINCENT MALAVARCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-566

EUGENE CURICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Malavarco Pet. App. 81-105) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1972. The petition for a writ of certiorari in No. 72-408 was filed on September 9, 1972. On September 11, 1972, Mr. Justice Marshall extended

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the time within which the petition in No. 72–566 could be filed until October 10, 1972, and the petition was filed on October 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether hearsay statements of co-conspirators were properly admitted against petitioners.

2. Whether the evidence was sufficient to support petitioner Malavarco's conviction.

3. Whether the trial court properly exercised its discretion in denying petitioners' motions for severance.

4. Whether evidence that petitioner Curico failed to answer two questions during post-arrest interrogation violated his privilege against self-incrimination.

STATEMENT

After a jury trial with others [1] in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952 (interstate travel in aid of racketeering). Petitioner Curico was also convicted of a violation of Section 1952. Malavarco was sentenced to a one-year

[1] Petitioners were two of twelve defendants indicted in fourteen counts. Defendant Variano entered a plea of guilty to the conspiracy count prior to trial; defendant Sabbatini, a state policeman, was severed prior to trial, and his case was later dismissed; defendants Cassino, Rattenni and Roman were convicted on the conspiracy count and on various substantive counts; defendant Alter was acquitted; and the jury did not consider the cases of the other defendants. Certiorari petitions have also been filed by defendants Rattenni (72–816) and Cassino and Roman (72–820).

term of imprisonment; Curico was sentenced to concurrent eighteen month prison terms. The court of appeals affirmed in a thorough opinion.

The evidence, which is fully detailed in the opinion below (Malavarco Pet. App. 83–92), showed that in October 1969 New York State police officer Joseph Colligan was contacted by an associate of Peter Variano for the purpose of setting up a meeting to discuss Variano's gambling operations in Rockland County. Colligan informed his superiors of this contact and, with their approval, eventually met with Variano. Variano told Colligan that he had a "marriage" with several state policemen, including petitioners and co-defendant Charles Cassino. Variano added that over the last year he had asked petitioners to "get to" Colligan for Variano with reference to his gambling operation, but they had refused to do so, saying that Colligan was an erratic person who might do something foolish (Tr. 209, 222–232, 237–238, 260–262, 707). Variano informed Colligan that he operated on both sides of the Hudson River and that twenty percent of his business was done on the west side, in Orange and Rockland Counties (Tr. 290, 330–331). Variano furnished Colligan with the locations and telephone numbers of his gambling establishments, so that Colligan would be able to protect them (Tr. 287, 337–338, 405, 434–435, 536–537; G.X. 25).

On November 19, 1969, Variano, Colligan and co-defendant Rattenni met to discuss various problems. One subject was other state policemen who were providing protection. During this conversation, Variano

stated that petitioners and Cassino took care of state policeman Sabbatini "moneywise" (Tr. 352). Rattenni said that Malavarco was "a very good boy [who] did things without making any noise," and he described Curico as "a very classy person [who] didn't make any noise when he did anything for you" (Tr. 352–353). Variano told Colligan that he had requested Malavarco's permission to use certain telephones in Westchester County (Tr. 330–331)[2]; that Malavarco had investigated a competitor of Variano's at Variano's request (Tr. 364–365, 374)[3]; that he had asked Malavarco to stay in touch with Sabbatini concerning gambling raids while Variano, Colligan, Cassino, and petitioner Curico went to Puerto Rico (Tr. 448–449, 470–471); and that petitioner Malavarco paid petitioner Curico and Sabbatini out of the money that he was paid by Variano (Tr. 470–471, 498).

During the course of Colligan's undercover investigation, surveillance was conducted of his meetings with Variano and of the activities of petitioners. Petitioner Malavarco was seen meeting with Variano in Variano's car near petitioner's home on three occasions during December 1969 and February 1970 (Tr. 1270–1277) and once, in December 1969, in the men's room of a restaurant (Tr. 1591–1592).

On November 26, 1969, Variano gave Colligan a Westchester County telephone number that he said

[2] This was prior to the period covered by the indictment.

[3] On December 1, 1969, after hearing from Variano that Malavarco had been successful in an investigation of one of Variano's competitors, Rattenni said in Colligan's presence: "See, I told you you can trust this kid" (Tr. 374).

belonged to Harry Creighton, a policy operator who was competing with him in the Orangeburg area of Rockland County. He asked Colligan to forward the number to petitioner Malavarco so that he could do something about Creighton. Variano also suggested that Colligan ask Malavarco who Variano was and predicted that Malavarco would demonstrate his loyalty to Variano by saying that he was a small time bookmaker who was no longer in business (Tr. 364–365). Colligan telephoned Malavarco the next day, gave him Creighton's number, and asked him to investigate it. Malavarco said he would do so and, in response to Colligan's inquiry as to who Variano was, said "some people say he is a bookmaker, some people say he is a big bookmaker, some people say he operates strictly in Rockland County, but he [Malavarco] never heard of him in Westchester County" (Tr. 372). On December 1, 1969, Colligan reported his conversation with Malavarco to Variano and Rattenni and was informed by Variano that Malavarco had been successful in his investigation of Creighton (Tr. 374). Malavarco himself told Colligan on January 15, 1970, that he had just arrested Creighton for bookmaking (Tr. 445).

In late January 1970, Colligan, Cassino, and petitioner Curico spent several days in Puerto Rico as Variano's guests. Cassino and petitioner Curico stayed at the same hotel where Variano was staying, were taken to dinner and a show by Variano on two occasions, and were frequently seen in his company (Tr. 446, 474–477, 480–481, 486, 1633–1644). During this

trip petitioner Curico told Colligan that he had been accepting "meals, drinks and stuff" from Variano for nine months (Tr. 475). In Curico's presence, Cassino told Colligan that he paid Sabbatini $100 a month for "information that [Sabbatini] was giving out on gambling to Vincent Malavarco" (Tr. 478). Also in petitioner Curico's presence, Cassino told Colligan that the Spanish policy operation in Haverstraw, New York "used to be with us, but they are not with us any more" (Tr. 478–480).

Colligan's investigation ended on March 5, 1970, with the arrests of petitioners, Cassino and others. After his arrest, Cassino confessed to his involvement in Variano's gambling enterprises. When, after his arrest, petitioner Malavarco was asked about Variano, he denied having met Variano on the four occasions when the two men were seen together by surveilling agents, or on any other occasion (Tr. 1613–1619). At trial, Malavarco admitted being with Variano on the four occasions testified to by government witnesses but denied that the meetings were prearranged and claimed that his conversations with Variano were innocent and that he had told Variano to leave him alone (Tr. 2530, 2534, 2540).[4] Malavarco admitted, however, that he had not reported these meetings to his superiors (Tr. 2575–2576). Malavarco also denied having received money or gifts from another defend-

[4] Petitioner testified that at the first meeting Variano asked if he was still mad at him. At the second meeting, according to petitioner, Variano asked him: "Did a friend of yours see you to say hello?" Petitioner testified that at the third meeting he told Variano to stay away from him (Tr. 2536–2549).

ant or having taken part in any corruption (Tr. 2556–2557).

In his testimony, petitioner Curico denied that he had agreed with Variano to violate his public trust for money or that he had accepted bribes from anyone to protect gambling establishments. With respect to Puerto Rico, he claimed that he paid his own expenses and had not known that Variano would be staying at the same hotel. Curico also denied having told Colligan that he was getting "free drinks and food and stuff" (Tr. 2326, 2331–2334, 2338–2343). Curico admitted, however, that he had not told his superiors that he had been with Variano in Puerto Rico or that he had seen Variano at a restaurant in Nyack, New York, on December 29, 1969, and conceded that he had told Colligan and Cassino that he would deny having been to Puerto Rico if questioned (Tr. 2358–2359, 2366–2367, 2437).

ARGUMENT

1. Petitioner Malavarco contends (Pet. 13–63) that hearsay declarations by co-conspirators were improperly admitted against him, since there was no independent evidence linking him to the conspiracy, and that the evidence was insufficient to support his conviction. Whether evidence, independent of hearsay statements, is sufficient to show a defendant's participation in a conspiracy is to be determined under the "fair preponderance" test, not the "beyond a reasonable doubt" standard. *United States* v. *Geaney,* 417 F. 2d 1116, 1119–1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028; *United*

States v. *Calabro*, 449 F. 2d 885, 889–891 (C.A. 2), certiorari denied, 404 U.S. 1047. The independent evidence of Malavarco's involvement with Variano's operation was more than sufficient to meet the "fair preponderance" test for establishing his membership in the conspiracy and justified the admission of his co-conspirators' declarations. As we have described in the Statement, the evidence showed that Malavarco, a state policeman, met furtively with Variano on at least four occasions during the course of the conspiracy—once in the men's room of a restaurant and three times in the early morning in Variano's car (Tr. 1270–1277, 1591–1592). In addition, when Colligan asked Malavarco about Variano, he gave substantially the false exculpatory answer which Variano had predicted.[5] Finally, when he was arrested, Malavarco falsely denied knowing Variano or having met with him despite the four occasions when they were seen together (Tr. 1613–1619). This independent proof of Malavarco's participation in the conspiracy was sufficient to warrant the admission against him of Variano's and Rattenni's statements set forth above. See *United States* v. *Calabro, supra.*

Petitioner Curico, citing *Morello* v. *United States*, 250 F. 2d 631 (C.A. 2), and *United States* v. *DeSapio*, 435 F. 2d 272 (C.A. 2), certiorari denied, 402 U.S. 999, contends that Colligan was incompetent to testify as to hearsay statements linking Curico to the con-

[5] Malavarco said that Variano was reputed to be bookmaker in Rockland County, but that he never heard of him in Westchester County (Tr. 372) where, according to Variano's estimate, 80% of his business was done (Tr. 290, 330–331).

spiracy because Colligan was not a co-conspirator. However, Colligan's testimony was clearly admissible since he testified not to his own declarations but to what other co-conspirators said and did in his presence. *Morello* and *DeSapio* are thus inapposite, since they involved situations where a non-conspirator testified to his own declarations.

2. Despite petitioner Malavarco's contention, there was ample proof, as outlined above, to support his conviction.[6] Malavarco maintains, however, that the court of appeals adopted the wrong standard in upholding the sufficiency of the evidence by not applying the rule that, where the government's evidence is wholly circumstantial, it must be such that every reasonable hypothesis other than that of guilt is excluded. In *Holland* v. *United States*, 348 U.S. 121, 139–140, this Court held that formulation inappropriate for a jury instruction. It is even less appropriate as a standard of appellate review, where the record is examined "not for the purpose of weighing the evid-

[6]The proof of Malavarco's knowledge that the conspiracy contemplated interstate or foreign travel was also sufficient. Before going to Puerto Rico, Variano asked Malavarco to "mind the store" (Tr. 448–449). The jury could properly infer that Variano explained to Malavarco that he wanted him to keep an eye on things because he did not want to have his places of business raided while he was away. It is a fair inference that he agreed to Variano's request, since Variano actually made the trip with Colligan, Cassino and petitioner Curico. It is also fair to conclude that Malavarco knew that Colligan's trip was a "fringe benefit" for protecting Variano's gambling establishments and that one reason why Variano and Colligan were going to Puerto Rico was to discuss Variano's operations and the problems involved in protecting them.

ence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 154. See, *e.g.*, *Dirring* v. *United States*, 328 F. 2d 512 (C.A 1), certiorari denied, 377 U.S. 1003; *United States* v. *Aadal*, 368 F. 2d 962 (C.A. 2), certiorari denied, 386 U.S. 970; *United States* v. *Boyle*, 402 F. 2d 757 (C.A. 3), certiorari denied, 394 U.S. 934.

3. Both petitioners maintain that the trial court erred in failing to grant their motions for severance. However, the grant of a motion for severance under Rule 14 is committed to the sound discretion of the trial court, and denial of such a motion will not be overturned on appeal unless there is an affirmative showing of abuse of discretion. *Opper* v. *United States*, 348 U.S. 84, 95; *Tillman* v. *United States*, 406 F. 2d 930, 934–935 (C.A. 5), vacated on other grounds, 395 U.S. 830; *Gordon* v. *United States*, 438 F. 2d 858, 878–879 (C.A. 5), certiorari denied, 404 U.S. 828. There was no abuse of discretion here. Petitioners and their co-defendants were shown to have participated in a common criminal scheme, and no prejudice resulted from their joint trial. That petitioners might have had a better chance of acquittal by being separately tried is not sufficient to justify a severance.[7] *United States* v. *Borelli*, 435 F. 2d 500, 502 (C.A. 2), certiorari denied, 401 U.S. 946; *United States* v. *DeSapio*, 435 F. 2d 272, 280 (C.A. 2), certiorari denied, 402 U.S. 999.

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[7] Petitioner Malavarco was acquitted on the substantive count.

Petitioner Malavarco contends, however, that his case should have been severed after Agent Sullivan testified to Cassino's confession. He relies for this proposition on *Bruton* v. *United States*, 391 U.S. 123.[5] On direct examination, Sullivan testified to post-arrest admissions by Cassino, without stating that Cassino had mentioned anyone other than Variano (who was not on trial). Counsel were then given copies of Sullivan's report concerning Cassino's confession (G.X. 80 for identification), following which the attorneys for three defendants (not petitioners) stated their intention to bring out on cross-examination the fact that Cassino had not mentioned their clients in his confession (Tr. 1952–1953). After a lengthy discussion between the court and counsel (Tr. 1952–1955, 1990–2019), these defendants were permitted to elicit the desired testimony from Sullivan without referring to defendants who were mentioned in Cassino's confession (Tr. 1997–1998, 2018, 2022–2023, 2026–2027). One attorney went further and elicited from Sullivan the fact that, although his client was not mentioned by Cassino, other defendants were (Tr. 2024–2025).

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[5] Petitioner's additional assertion that the admission of hearsay statements *ipso facto* violates his right to confront the witnesses against him is without merit. Since the statements were made in furtherance of the conspiracy, their admission does not violate the Confrontation Clause of the Sixth Amendment. See *Dutton* v. *Evans*, 400 U.S. 74; *United States* v. *American Radiator and Standard Sanitary Corp.*, 433 F. 2d 174, 194 (C.A. 3), certiorari denied, 401 U.S. 948; *Campbell* v. *United States*, 415 F. 2d 356, 357 (C.A. 6).

As the court of appeals noted (Malavarco Pet. App. 104–105), while the jury might have inferred that one of the other defendants mentioned by Sullivan was Malavarco, the jury did not "necessarily or even probably" have to conclude that the reference was inculpatory, since both Cassino and petitioner were state troopers, and Cassino might have mentioned petitioner's name only in that context. Further, as the court noted, the inference that petitioner was one of the other defendants and the further inference that the reference was inculpatory were not vital to the government's case against petitioner. The evidence of petitioner's guilt provided by the declarations of Variano and Rattenni and the testimony of the agents who conducted the surveillance of petitioner was more than ample to obviate the need for a severance on *Bruton* grounds, when set against the limited effect and speculative nature of the adverse inference that the jury might have drawn. See *Schneble* v. *Florida*, 405 U.S. 427. Moreover, the trial court promptly and carefully instructed the jury not to speculate concerning the mention of other defendants in Cassino's confession (Tr. 2028–3030).

Petitioner Curico contends that he was entitled to a severance because Cassino's confession implied that Variano had paid for Curico's trip to Puerto Rico. However, Agent Sullivan testified only that when Cassino was asked who paid for Cassino's trip, he replied that Variano had (Tr. 1908).

4. Petitioner Curico's contention that the admission of evidence that he failed to answer two questions put

to him during post-arrest interrogation violated his privilege against self-incrimination is without merit, since there is no basis for concluding that he was invoking his privilege when he failed to answer. Petitioner, a police officer, was fully aware of his right to remain silent. However, he voluntarily chose not to exercise that right and he answered all questions but these two, which sought details on exculpatory assertions petitioner was making (see Curico Pet. 10–11). When he gave no answer to these two questions he did not say that he wanted to exercise his privilege; he simply said nothing. Moreover, Curico later testified at trial that he answered all the questions put to him by the agent (Tr. 2323, 2441).[9] There was no prejudicial error in allowing the investigating agent's answers to stand.

5. Petitioner Malavarco's contention that the trial court's supplemental charge was coercive is fully answered by the opinion of the court below, on which we rely (Malavarco Pet. App. 96–98). Both petitioners also allege that the prosecutor committed prejudicial error in not bringing out on direct examination of Colligan that he had accepted a color television set from Variano. As the court of appeals pointed out (Pet. App. 102), while this may have been "unwise" it was not prejudicial. The matter was gone into on cross-examination, and the jury was fully apprised of the details of this transaction.

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[9] Petitioner Curico's attorney dwelt upon Curico's willingness to answer questions in his cross-examination of the agent (Tr. 1689–1693, 1698–1699).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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